

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ROBIN LANE

Claimant

VS.

PAYLESS SHOESOURCE

Respondent

Self-Insured

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Docket No. 210,370

ORDER

Respondent appeals from a preliminary hearing Order entered by Administrative Law Judge Floyd V. Palmer on August 14, 1996. The Order granted claimant's request for temporary total disability benefits and medical expenses.

ISSUES

In its Application for Review respondent describes the issues as follows:

"1. Whether or not the claimant sustained personal injury by accident as claimed or, in the alternative, whether or not the claimant's bilateral hernias arose out of and in the course of his employment.

"2. Whether timely notice of claimant's bilateral hernias was given as required under K.S.A. 44-520.

"3. Whether claimant made timely written claim with regard to his bilateral hernias as required by K.S.A. 44-520a.

"4. Whether claimant's bilateral hernias were the natural and probable consequence of an accident arising out of and in the course of claimant's employment on or about April 25, 1995.

“5. Whether the claimant was, at any time relevant, an employee of Volume Shoe Corporation?”

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments of the parties, the Appeals Board finds that the August 14, 1996, Order by Administrative Law Judge Floyd V. Palmer should be affirmed.

Claimant alleges bilateral inguinal hernias resulting from work activities. The Appeals Board finds that claimant's injuries did arise out of and in the course of his employment. The finding is based primarily on the report of Dr. Robert T. McElroy which describes the injuries as more probably than not related to claimant's lifting at work.

The Appeals Board also finds that claimant satisfied the notice requirements of K.S.A. 44-520. Claimant has alleged and given testimony indicating his injuries occurred on April 25, 1995, when pallets fell on him and knocked him onto a conveyor track. Claimant's first symptoms of the hernias appeared on July 4, 1995, while at home in bed. Dr. McElroy, as previously indicated, concluded that the injury occurred from lifting. He also states in his report that it is not unusual to have an asymptomatic hernia and indicates that claimant's hernias could have occurred at work without any pain associated at the time of the injury.

On the basis of Dr. McElroy's report the Appeals Board concludes that the record does not establish the incident of April 25, 1995, as the cause of claimant's injury. Instead, the record supports the conclusion that the injury occurred from the lifting at work sometime before July 4, 1995. In all likelihood, as respondent suggests, the injury occurred in June 1995. Claimant gave notice within 10 days of the onset of symptoms on July 4, 1995, by notifying the respondent that he was claiming workers compensation benefits for the bilateral inguinal hernias. Claimant had just cause for not notifying respondent earlier as the injury had not manifested itself until the onset of symptoms.

The Appeals Board also finds claimant made timely written claim sufficient to satisfy the requirements of K.S.A. 44-520a. Written claim was filed in the form of an Application for Hearing on February 22, 1996, more than 200 days after claimant's injury but less than a year. Respondent argues that claimant should be limited to 200 days. In its argument respondent acknowledges the evidence establishes the possibility of injury in June of 1995, but insists it received no notice of an injury in June of 1995. Respondent asserts that respondent, therefore, had no obligation to file an employer's report of accident. The provisions of K.S.A. 44-557 extend the written claim requirement to one year only when no report of accident is filed after respondent is notified. The argument does not fit the facts of this case. Claimant notified respondent that he suffered hernias arising from his work activities. Failure to give the correct date is not fatal where the specific date would be

difficult to identify. In order to limit the time for filing the claim to 200 days, respondent had an obligation to file an employer's report of accident. Respondent does not claim to have filed any report of accident either for April 25, 1995, or June 1995. Claimant, therefore, had one year within which to file a written notice and has satisfied that requirement.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order entered by Administrative Law Judge Floyd V. Palmer dated August 14, 1996, should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of October 1996.

BOARD MEMBER

c: Ronald J. Laskowski, Topeka, KS
Jeff K. Cooper, Topeka, KS
Floyd V. Palmer, Administrative Law Judge
Philip S. Harness, Director